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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No.____

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, A CORPORATION; WILSON McCARTHY AND HENRY SWAN, TRUSTEES OF ITS PROPERTY,

Petitioners,

vs.

PROVO CITY, A MUNICIPAL CORPORATION; MAURICE HARDING, MAYOR, AND JOSEPH H. SWAPP AND BLAKE D. PALFREYMAN, COMMISSIONERS OF SAID PROVO CITY,

Respondents.

No.____

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, A CORPORATION; WILSON McCARTHY AND HENRY SWAN, TRUSTEES OF ITS PROPERTY,

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vs.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of The Denver and Rio Grande Western Railroad Company, a corporation, and Wilson McCarthy and

Henry Swan, Trustees of its property, respectfully shows:

Summary and Short Statement of Matter Involved

(Petitioners will be referred to as "the Railroad" and Respondents as "the City.")

The United States Circuit Court of Appeals, Tenth Circuit, has decided the question of Utah law which controls this case clearly contrary to applicable decisions by the Supreme Court of Utah in a case wherein, since the findings of fact by the trial court were based on substantial evidence, there is no dispute as to the facts involved. (R. 557.) In 1943, the Railroad, on account of greatly increased war traffic, was under the absolute necessity of rebuilding its switch yards in or near Provo City as expeditiously as possible. It had a clear choice to build them inside or outside the City limits but expressly stipulated to the City Commission that the yards would not be built in Provo City unless Ninth South Street, where it crossed the proposed yards, would be closed to all traffic. The City, in order to increase taxes and employment, urged and induced the Railroad to build inside the City and promised the Railroad that it would proceed forthwith to take the necessary steps to pass an ordinance closing the crossing. It also stated to the Railroad that it need not await the legal formalities but might proceed at once in reliance upon the promise of the Commission. Immediately after being thus assured, in April, 1943, the Railroad physically closed the crossing and proceeded to build the yards inside Provo City at a cost of $160,000.00, most of the benefit of which will be lost if the crossing should be opened. The City, although it realized the expected benefits, failed to keep its promise and in 1945 commenced trying to open the crossing. The District Court held the City estopped and enjoined it, because the Court concluded that the law of Utah, established in *Wall* v. *Salt Lake City*, 50 Utah 593, 168 Pac. 766, and reiterated in *Tooele City* v. *Elkington*, 100 Utah 485, 116 Pac. (2d) 406, so required under these circumstances.

There is no difference as to the facts herein stated between the majority opinion written by Circuit Judge Bratton and concurred in by Circuit Judge Huxman and the dissenting opinion written by Circuit Judge Orie L. Phillips. The

findings of the trial court are supported by substantial evidence, are not clearly erroneous and are recognized by the majority and dissent as binding upon the Circuit Court of Appeals. Such Findings and evidence support the foregoing summary and short statement of the matter involved as will be demonstrated in the brief.

The whole difference between the majority and minority is based upon different conceptions as to the correct meaning of *Tooele City* v. *Elkington*, 100 Utah 485, 116 Pac. (2d) 406 and *Hall* v. *North Ogden City*, ... Utah ..., 166 Pac. (2d) 221. (R. 557.) The majority treated these two cases as changing the Utah law as announced in the *Wall* case. The minority points out on the contrary that they do not have any such effect. That the minority is correct and the majority is incorrect will be clearly evident from a reading of the cases.

Jurisdictional Statement

(a) Jurisdiction to review this case by certiorari is sustained by Section 240 of the Judicial Code, 43 Stat. 938, Title 28 U. S. C. Section 347.

(b) The judgment of the United States Circuit Court of Appeals for the Tenth Circuit was rendered on July 25, 1946. (R. 569.) No petition for rehearing was filed. This petition for writ of certiorari will be filed in this court prior to October 25, 1946.

(c) Jurisdiction in No. 3239, the civil suit, is based upon 28 U. S. C. Section 41, because the corporate plaintiff is a citizen of Delaware, plaintiffs Wilson McCarthy and Henry Swan are citizens of Colorado, Provo City is a Utah municipal corporation and the Mayor and Commissioners are citizens of Utah. The amount involved is in excess of $3,000.00, exclusive of interest and costs.

Jurisdiction in No. 3240 was exercised pursuant to a petition by the Trustees in bankruptcy authorized by an order of the District Judge of the United States District Court for the District of Colorado, In the Matter of The Denver and Rio Grande Western Railroad Company, Debtor, in Proceedings

for the Reorganization of that Railroad. Copy of the order appears at R. 504.

Question Presented

The question presented is whether the majority opinion of the Tenth Circuit Court of Appeals correctly or incorrectly decided that the City should not be estopped and enjoined to claim that Ninth South Street, where it crosses the Railroad yards, was not validly closed. The District Court held that the City should be estopped and enjoined and senior Circuit Judge Phillips would have affirmed the District Court.

Reasons Relied on for Allowance of Writ

Under the Findings of the District Court, which are sustained by substantial evidence, are not clearly erroneous and are therefore binding upon the Circuit Court of Appeals, the sole question before the Circuit Court of Appeals was one of law: Should the City be estopped and enjoined from contending that the street was not properly closed and attempting to open it. This was a question to be determined according to Utah law. The Supreme Court of Utah in *Wall* v. *Salt Lake City*, 50 Utah 593, 168 Pac. 766, (1917) held under these circumstances that a city should be estopped. This principle of the *Wall* case was reiterated by the Supreme Court of Utah in *Tooele City* v. *Elkington*, 100 Utah 485, 116 Pac. (2d) 406, in which the court recognized the doctrine of estoppel, raised the question as to whether applicable in the *Elkington* case but decided that the elements necessary for its application were not present. The majority opinion in the Tenth Circuit Court of Appeals misconstrued the *Elkington* case and considered that it changed the rule in the *Wall* case. The majority opinion also erroneously considered that the more recent case of *Hall* v. *North Ogden City*, ... Utah ....., 166 Pac. (2d) 221, impaired the authority of the *Wall* case. A reading of the three cases will clearly disclose that the *Wall* case stands unreversed and unimpaired as the law of the State of Utah.

WHEREFORE, your petitioners pray that a writ of certiorari be issued by this court to the United States Circuit

Court of Appeals, Tenth Circuit, to the end that the judgment of said court may be reviewed by this Honorable Court.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY and WILSON McCARTHY and HENRY SWAN,
Trustees of its property

By WALDEMAR Q. VAN COTT,
DENNIS McCARTHY,
1311 Walker Bank Building,
Salt Lake City, Utah.
Their Counsel

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Opinion of Court Below

The Findings of Fact, Conclusions of Law and Judgment in the plenary suit will be found at R. 18, 26 and 28. The Findings of Fact, Conclusions of Law and Judgment in the ancillary action will be found at R. 48 and 50.

A statement by the District Court in the nature of an opinion appears at R. 498-502. No opinion by the District Court is printed.

The majority and dissenting opinions of the Tenth Circuit Court of Appeals appear at R. 557 to 568 but such opinion is not yet reported.

Grounds on which Jurisdiction of the Supreme Court of the United States is Invoked

The judgment of the United States Circuit Court of Appeals, Tenth Circuit, was rendered on July 25, 1946. (R. 569.) No petition for rehearing was filed. Petition to the Supreme Court of the United States for writ of certiorari was filed prior to October 25, 1946. The jurisdiction of the Supreme Court of the United States is invoked under

Section 240 of the Judicial Code, 43 Stat. 938, Title 28 U. S. C. Section 347.

Statement of the Case

The majority opinion gives a very meager statement of the case with only highly compendious statements as to the facts. It does, however, regard the findings of fact by the trial court as supported by substantial evidence, not clearly erroneous and as binding upon them. The majority opinion concedes that the negotiations between the Railroad and the City resulted in an oral agreement that the ordinance closing Ninth South would be passed. (R. 557, 560.) It does not, however, mention the finding of fact that the Mayor and City Commissioners not only promised to pass the ordinance closing the crossing but also affirmatively represented to the Railroad that it could proceed at once and need not await the legal formality of the passing of the ordinance. (R. 21.) Generally the majority opinion does not state the case in sufficient detail properly to present the elements of equitable estoppel upon which the trial court based its judgment and decree. Circuit Judge Phillips, on the other hand, in his dissenting opinion, makes a detailed statement of the case, with which the statements respecting the case in the majority opinion are consistent. Anticipating that a judicial statement of the case will authenticate itself far beyond a statement by counsel for petitioners, petitioners adopt Judge Phillips' statement of the case, merely adding references to the printed record.

Reference to the record herein thus: (R. 20 — 56-65) means that the Court's Finding of Fact appears at R. 20 and evidence supporting it at R. 56-65.

Circuit Judge Phillips stated the case as follows:

> "The findings of the trial court are supported by substantial evidence and are not clearly erroneous and, therefore, are binding on this court. The findings and undisputed evidence reflect these facts: In 1942, the Denver and Rio Grande Western Railroad Company[1]

[1]Hereinafter called the Railroad Company.

entered into negotiations with the mayor and commissioners of Provo City respecting the building of new railroad yards and the closing of Ninth South and Fifth East Streets in Provo. The negotiations continued into 1943. (R. 20 — 66, 70, 140, 167.)

"Throughout the years 1942 and 1943, Maurice Harding was mayor and J. P. McGuire and Joseph H. Swapp were the other two members of the city commission. In the fall of 1943, there was a municipal election to fill the office of mayor and the office of commissioner held by McGuire. Harding was reelected. McGuire failed of reelection, and Blake D. Palfreyman was elected in his place.

"During 1942 and 1943, freight traffic handled by the Railroad Company in its freight yards in Provo increased to such an extent that extensive railroad yards had to be constructed. (R. 20 — 56-65.) The agent of the Railroad Company at Provo explained the situation to the mayor and commissioners in July, 1942, and February, 1943. (R. 20 — 66, 70, 140, 167.) He advised the city officials that the Railroad Company could enlarge the existing yards within the corporate limits of Provo, but that it would require the closing of Ninth South Street and Fifth East Street; that as an alternative, the Railroad Company could build new yards outside of Provo. (R. 20 — 69, 140, 167.) The mayor and commissioners, in order to increase tax receipts and business and employment within the city, urged the Railroad Company to enlarge the existing yards within the city limits. (R. 20 — 70, 72, 140, 167, 260.)

"At a meeting of the city commissioners held on February 25, 1943, the mayor, the other commissioners, the city attorney, and representatives of the Railroad Company were present. (R. 71-73, 138, 139.) The agent of the Railroad Company told the city officials that the project would cost over $100,000, (R. 140), and exhibited to them a map of the proposed enlargement of the yards showing Ninth South Street and

Fifth East Street closed, and a cut-off street between Fifth East and Ninth South Streets. (R. 74.) The agent of the Railroad Company again told the city officials that if the yards were extended within the city, such streets would have to be closed. (R. 20 — 75, 140, 166, 167, 234, 407.) Thereupon, the mayor and commissioners agreed to enact an ordinance closing the streets. (R. 20 — 77, 78, 141, 168.) A statement was given to the press. (R. 78, 187, 190, 191.) A news item in the Provo Daily Herald issue of February 25, 1943, a newspaper of general circulation in Provo, described the project, stated that it would be necessary to close Ninth South Street, and described the cut-off road between Ninth South and Fifth East Streets. (R. 531.) The city officials and the Railroad Company representatives agreed that the Railroad Company attorney should prepare the necessary ordinance for the closing of the streets and send it to the city attorney of Provo. (R. 75, 77, 78, 142, 236, 377, 409.) On March 9, 1943, the attorney for the Railroad Company forwarded a form of ordinance to the city attorney. (Exhibit 28, R. 143-145, offered in evidence R. 144, Exhibit 29, R. 145, 146, offered in evidence R. 144.)

"On February 27, 1943, a group of approximately 200 citizens of Provo protested the closing of Fifth East and Ninth South Streets. (Ex. 64, R. 91.)

"The Railroad Company kept in touch with the mayor (R. 83) and repeatedly asked when the ordinance would be passed. (R. 83, 168.) The enlargement of the yards was imperative and the Railroad Company urged the city officials to proceed with the enactment of the ordinance in order that construction work could be commenced. (R. 21 — 168.) On April 7, 1943, Mayor Harding told the Railroad Company agent at Provo that the ordinance would be passed, the streets closed, and that the Railroad Company could go ahead immediately with the construction of the yards without waiting for the enactment of the ordinance. (R. 21 — 169, 254-258.) On April 9, the Provo Daily Herald published an article that Ninth South Street

was to be closed. (R. 90, 169, Exhibit 26, R. 533, offered in evidence R. 90.) The information did not come from the Railroad Company (R. 169) and must have come from Mayor Harding. The newspaper article stated, 'Closing of Ninth South street . . . will be ordered by the city commission in an ordinance to be adopted next week.' It then quoted Mayor Harding as follows: 'With numerous tracks to be constructed across the street, a dangerous hazard would result unless the road is closed.' (Exhibit 26, R. 533, offered in evidence R. 90.) On April 7, the agent at Provo telephoned to the Railroad Company's representative at Salt Lake City that the work could commence at once. (R. 83, 169.) On the same date, the Railroad Company superintendent directed the Division Engineer to proceed with the work. (Exhibit 25, R. 86, offered in evidence R. 86.)

"The Railroad Company relied on the promise of the mayor and city officials, and abandoned the alternative plan of building outside of Provo. Immediately after April 7, 1943, the Railroad Company secured an easement for (R. 96), and constructed (R. 96), the cutoff road 41.25 feet wide and approximately 700 feet long from Fifth East to Ninth South Streets. (R. 97.) The cut-off road was accepted as a public road and has been continually used as such and has been maintained by Provo. (R. 261, 416.) It is shown on the Provo map as a public street. (R. 261.) The Railroad Company secured the land necessary for the new yards, and construction of the yards was commenced on April 11, 1943, (R. 181) and continued until the fall of 1943. (R. 94, 95.) The Ninth South Street crossing was barricaded and closed to travel in May, 1943. (R. 182.) Eight new tracks were laid across Ninth South Street in June and July, 1943. (R. 183.) The Railroad Company expended for the improvements $160,000. (R. 21, 22 — 94-101.) The city officials (R. 258, 259, 383, 384, 412, 413, 416, 417) and the public (Exhibit 26, R. 90, offered in evidence R. 90, 533, R. 23 — 319, 342, 361, 366) knew of, and acquiesced in, the closing of the

streets. The city officials made no objection to the closing of the streets during 1943 and 1944. (R. 253.) No effort has ever been made to open Fifth East Street. (R. 23 — 168, 261.) In March, 1945, the city undertook to open that portion of Ninth South Street which had been closed. (R. 250, 251.)

"The city cooperated with the Railroad Company in the construction of the yards. The city built new water pipelines along Ninth South Street. The city changed its plans because of the projected railroad yard enlargement and put in an additional 6-inch cast-iron pipeline so that the city would not later have to tunnel under the tracks. (R. 287.) The additional pipeline was recommended by the city engineer to the mayor and commissioners in April, 1943. The engineer stated that the pipeline should be installed before the tracks were laid. (R. 287.) The Railroad Company left the new tracks open until the city had finished its trench for the pipeline. (R. 183.) At the request of the city, the Railroad Company did some of the city's work and was reimbursed for it. (R. 183, 184, 282.)

"The construction of the yards has resulted in an increase of tax revenue to Provo of approximately $2,400 per year. (R. 25 — 127, 260.)

"The opening of Ninth South Street across the railroad yards and tracks would make it necessary for trains and cuts of cars being switched or stored to be divided at the crossing (R. 23 — 103) and would slow down the handling of trains and cars in the yards. (R. 23 — 189.) It would reduce the usefulness and efficiency of the yards to the extent of 50 per cent (R. 23 — 104), and greatly increase the cost of operating the yards. (R. 23 — 103.) It would constitute a serious danger and hazard to the public traveling across such railroad yards and tracks. (R. 23 — 103-105, 187-190, 191-199.) The city has never offered to reimburse the Railroad Company or place it in status quo for the losses and damages that would result from the reopening of Ninth South Street. (R. 24.)

"When the agreement was reached for the closing of the streets, two conditions were imposed by the city, one, that the cut-off road would be built, and two, that the Railroad Company would reimburse the city for the cost of moving certain water and light lines. (R. 20, 21.) The city has never moved such lines. The Railroad Company has repeatedly advised the city of its willingness to pay the cost thereof. No other conditions were imposed." (R. 24, 25.)

Specification of Error

The United States Circuit Court of Appeals, Tenth Circuit, erred in holding that the Utah law was such that Provo City should not be estopped and enjoined under the facts of this case.

Argument

The sole question is as to the Utah law. If the law of Utah is as set forth in *Wall* v. *Salt Lake City*, 50 Utah 593, 168 Pac. 766, there can be no question that the facts as found by the court bring the case within that doctrine. What is the Utah law? Does the *Wall* case still correctly state the Utah law? Circuit Judge Phillips declares that it does. The learned trial judge who has practiced and presided in Utah since 1890 held that it does. Circuit Judges Bratton and Huxman held that under the Utah law the trial court erred in estopping and enjoining the City. Which of these judges is correct? A reading and understanding of three cases will determine that question:

Wall v. *Salt Lake City*, 50 Utah 593, 168 Pac. 766

Tooele City v. *Elkington*, 100 Utah 485, 116 Pac. (2d) 406

Hall v. *North Ogden City*, ... Utah ....., 166 Pac. (2d) 221

In the *Wall* case plaintiff contended that Eighth South Street between Tenth East and Thirteenth East was only 66 feet in width and that the City should be restrained from digging a sewer excavation outside of such 66 foot limit. The

City contended that the street had been established 132 feet wide by original plats prior to 1871. Wall contended the City should be estopped because in 1891 the City approved a plat of Fremont Heights in which Eighth South Street was shown as only 66 feet in width. The city attempted to contend that its action in authorizing the approval of the Fremont Heights Addition was *ultra vires*, illegal and void but was estopped so to do.

The court stated the equities in the case as follows: in 1891 the question arose as to the width of the street; the City Council went upon the premises, inspected them and authorized the City Engineer to approve the plat; thereafter Wall's predecessor in interest deeded certain interests in lots for a nominal consideration; thereafter Wall loaned money on the security of a mortgage on the property in question which was thereafter foreclosed and the property bought by Wall; thereafter Wall sold and conveyed parts of the land in question by warranty deeds; improvements were made on the land in question and taxes levied and paid thereon.

The Court in the *Wall* case eliminated all questions, other than estoppel, and based its decision squarely upon estoppel. On page 596, the court said:

> * * * In our view the one question in this case which overshadows all others, and to which this opinion should be mainly directed, is whether or not the defendant city is estopped by reason of its own conduct from now claiming title to the property in question.

After referring to certain cases in which the doctrine of estoppel had not been applied to cities, the court on p. 601 distinguished them as follows:

> * * * None of them present a case like this, where the municipality, by its own affirmative acts, declarations, and conduct, misled the party, or induced him to believe that he had the right to rely upon the assurances which the municipality, after a long period of time, sought to repudiate to his injury. Indeed, it is hardly to be expected that many cases, if any at all,

can be found in the published reports similar to the case at bar. It will be found upon examination that many of the cases above cited place emphasis upon the fact that the municipality did not do anything affirmatively to mislead the party claiming the right to the ground in dispute.

The court in the *Wall* case approved the doctrine of equitable estoppel as stated by Judge Dillon in his work on Municipal Corporations—3 Dillon Municipal Corporations, 5th Edition, Section 119.

On page 604 the court said:

> * * * After discussing generally the doctrine of adverse possession and prescription as applied to public streets, Judge Dillon, in 3 Dillon, Mun. Corps. (5th Ed.) section 1194, says:
>
> "Upon consideration, it will perhaps appear that the following view is correct: Municipal corporations, as we have seen, are regarded as having in some respects, a double character, one public, the other (by way of distinction) private. As respects property not held for public use, or upon public trusts, and as respects contracts and rights of a private nature, there is no reason why such corporations should not fall within limitation statutes, and be affected by them unless excluded from them. For example, in an action on contract or for tort, a municipal corporation may plead or have pleaded against it the statute of limitations. But such a corporation does not own and cannot alien public streets or places, and no mere laches on its part or on that of its officers can defeat the right of the public thereto; yet there may grow up, in consequence, private rights of more persuasive force in the particular case than those of the public. It will perhaps be found that cases sometimes arise of such a character that justice requires that an equitable estoppel shall be asserted even against the public, but if so, such cases will form a law

> unto themselves, and do not fall within the legal operation of limitation enactments. The author cannot assent to the doctrine that, as respects public rights, municipal corporations are impliedly within ordinary limitation statutes. It is unsafe to recognize such a principle. But there is no danger in recognizing the principle of an estoppel in pais as applicable to exceptional cases, since this leaves the courts to decide the question, not by the mere lapse of time, but upon all the circumstances of the case to hold the public estopped or not, as right and justice may require."

The Utah Court emphasized that the City had benefited from increased taxes and had made no offer to place Wall in *status quo*, both of which facts occur in the case at bar. Said the court on p. 606:

> In addition to this the defendant went on for years and years assessing this property against the plaintiff as private property. Its revenues were increased by hundreds of dollars by the sums exacted from the plaintiff on the assumption of the defendant that the property assessed belonged to her. As far as the record disclosed not even the slightest pretense of an offer has ever been made to place her in statu quo.

The court in the *Wall* case also quoted with approval the following excerpt from *City of Sullivan* v. *Tichenor*, 179 Ill. 97, 53 N. E. 561 (page 607):

> "A municipal corporation can no more profit by fraud upon property owners than an individual and may be estopped by conduct."

On page 607 the court said:

> We hold that this case falls within the exceptional class of cases referred to by Judge Dillon, and that it is the duty of the court to decide it as "right and justice require." It is our opinion that the city is estopped from claiming the premises in question as a public street.

There appears to be no question that if the principles of the *Wall* case are still the Utah law the judgment and decree of the District Court were correct. But the majority opinion reasons that its authority is impaired or reversed by the *Elkington* and *Hall* cases. A reading of the *Elkington* and *Hall* cases will disclose that they cannot be regarded as either reversing or impairing the authority of the *Wall* case. On the contrary, the *Elkington* case is a re-affirmation of the principle of the *Wall* case. On this subject Circuit Judge Phillips made the following statement:

> "It is my opinion that the Supreme Court of Utah in Tooele City v. Elkington, 100 Utah 485, 116 P. 2d 406, and Hall v. North Ogden City, ... Utah ..., 166 P. 2d 221, did not depart from the doctrine announced in the Wall Case.
>
> "In the Elkington Case, the court, after reciting the facts in the Wall Case, said:
>
> > 'In the case at bar, the consideration given the city by Elkington was small, if anything; the deed was made in contravention of the statute; there is no evidence that the property has been assessed against the defendants or their predecessor in interest; the time element is short; and there was not a replatting or a change in the whole neighborhood to the benefit of all adjacent landowners.
> >
> > 'Balancing the justices of the cause, we find there is no ground for an estoppel in pais as against the city.'
>
> "If the fact that an ordinance vacating the street had not been enacted was in itself a sufficient answer to Elkington's claim, why did the court refer to the Wall Case, distinguish it on the facts, and expressly hold there was ground for an estoppel in pais?" (R. 567.)

A reading of the *Hall* case will disclose that the language therefrom quoted by the majority opinion on page 4 is purely

obiter dictum. Circuit Judge Phillips disposed of it summarily and accurately as follows:

> "In the Hall Case, Hall and others asserted claim to the streets by adverse possession. No claim of estoppel was asserted or decided. It was held that under the Territorial Townsite Act, under which the city claimed, the plaintiffs were prohibited from acquiring title by adverse use." (R. 567.)

The *Hall* case arose under the United States and Utah Township Acts. The Utah statute, Compiled Laws of Utah, 1876, Sec. 1174 (set forth in Appendix A), used most emphatic prohibitory language against any impairment of the public title. The statute reads in part:

> (The title) * * * shall vest in and be held by the corporation absolutely, and shall not be claimed adversely by any person or persons whatsoever.

The court sharply distinguishes between a case under the Township Act and one not under it. The Township Act is not applicable in the case at bar. Even in the presence of the emphatic prohibitory language of the Township Act, the court studiously avoided negativing the possibility of equitable estoppel being applicable in a proper case although under that statute. The court placed great emphasis on the circumstance in the *Hall* case that the fee was owned by the city, not the abutter. In the case at bar the fee is owned by the Railroad and, upon the closing of the street, that fee is free and clear of the easement. The court so found and concluded. (R. 25, 26.) Such was the uncontradicted evidence. (R. 157, 158.) Both the majority and minority opinions in the *Hall* case disclose the absence in that case of the elements essential in order to apply equitable estoppel against a municipal corporation in regard to public streets, (affirmative misrepresentations, reliance thereon and great hardship) which elements were present in the *Wall* case and so abundantly involved in the case at bar.

An accurate reading and understanding of the *Elkington* and *Hall* cases will fully confirm the analysis of them made by Judge Phillips. Far from overruling the *Wall* case, neither

of them even expresses a dictum or a suggestion that the *Wall* case was incorrectly decided. The *Hall* case doesn't even mention the *Wall* case.

On page 5 the majority opinion declares that the principle of the *Wall* case is to be applied only "where the city acted within the ambit of its legal authority but in an irregular way." That is precisely the situation in the case at bar. The City was within the ambit of its authority. The City had the power under Section 15-8-8 U. C. A. 1943 (See Appendix A for text) to close this crossing. It agreed informally to pass an ordinance closing it. It had that power. It failed to take the formal action of passing an ordinance. In all of the cases applying the estoppel doctrine there has been some legal irregularity. Otherwise the question of equitable estoppel is never reached. Thus in the *Wall* case the City contended that its action in approving the plat was ultra vires, illegal and void. See page 596.

In the *Wall* case the City had express statutory power to vacate the street by ordinance. Compiled Laws of Utah 1888, Vol. 1, Section 340. (See Appendix A for text.) Section 373 of the same statute provided that all powers granted, including the power to vacate streets, might be executed by ordinance. (See Appendix A for text.) The *Wall* and *Provo City* cases are identical in these particulars. In both of them the city had statutory power to vacate streets with the proviso that the city might do so by ordinance. In neither case did the city follow its statutory authority formally and technically. In the *Wall* case the vacation of the street occurred by approval of a plat which was inconsistent with the street being opened. In the *Provo City* case the city agreed to pass an ordinance. No difference in principle between the two cases is perceived.

On page 5 the majority opinion states that the principle of the *Wall* case does not apply where the Mayor and City Commissioners merely agreed verbally to pass an ordinance closing the street. It also gives considerable weight to the circumstances that the Railroad knew that an ordinance was the formality prescribed by the law and that it had not been passed. Informality and failure to act with technical legal exactness are always present in cases where the doctrine of

the *Wall* case is applied to municipal corporations. The doctrine of equitable estoppel is not reached unless the City has failed to function according to legally prescribed and formal methods. The doctrine is applicable in spite of the fact that the City has not followed prescribed legal and formal procedures. The *Wall* case may be searched from beginning to end and no such limitation as suggested by the majority opinion is to be found therein.

Cases applying the doctrine announced by Judge Dillon and relied on by the Supreme Court of Utah in the *Wall* case involve various informalities in failing to follow prescribed legal methods with knowledge on the part of the citizen that the law has not been followed.

One of the principal cases relied on by the *Wall* case, *Los Angeles* v. *Cohn*, 101 Cal. 373, 35 Pac. 1002, expressly stated that the agreement upon which equitable estoppel may be based might be in parol made by the City officials informally. Los Angeles brought an action to recover a tract of land at the intersection of Spring and Main Streets, which was covered by portion of building known as "Temple Block," claiming that the land in question was part of a public street. Before the building was commenced a controversy arose as to whether part of it was on the public street. The City Attorney reviewed the matter and reported that Temple was justified in erecting the building on the ground in question. Thereupon the building was completed and nothing was done until the commencement of the present action. On page 1004 the court said:

> If the city had expressly agreed by its officers, with defendants' grantors, *even in parol*, that a certain line should constitute the boundary line between the street and the grantor's property, and upon the faith of such agreement the grantors had erected a block of buildings flush with the line of the street, as agreed upon by all parties, it would be a hard law that would allow the city to repudiate that agreement, and destroy the grantor's property. No court should countenance such a thing, and an estoppel in pais will rise up in the pathway of a city, to bar it and its principal, the people, from the commission of such a grievous wrong;

> and, to give the acts of this city a very limited meaning, we think its conduct in the present case at least equivalent to an oral agreement as to the location of the true boundary line of the street. (Italics added.)

The Supreme Court of the United States in *Essex* v. *New England Telegraph Co.*, 239 U. S. 313, 60 L. Ed. 301, 36 S. Ct. 102, approved the doctrine announced by Dillon in a case where the Telegraph Co. knew formal official action was necessary and that only informal action, if any, had been taken.

The Telegraph Company made written application for a right of way for telegraph poles and lines. The record of the selectmen disclosed no official action but shortly thereafter the lines were constructed and maintained for many years. Thereafter the Telegraph Company needed to make repairs and replacements and asked for an official license. This was refused and a threat was made to prevent future operation of the lines. The court held that the town was estopped.

In *City of St. Joseph* v. *St. Joseph Terminal R. Co.*, 268 Mo. 47, 186 S. W. 1080, St. Joseph induced the railroad to build its terminal inside city limits. To this end it passed ordinances vacating some streets but not all that were to be covered by the terminal. The Railway built the terminal over certain streets which were not so vacated. Later a private individual bought property abutting on one of these streets and attempted to open the street. Even though official action by ordinance was the legally prescribed method of vacating streets and the railroad knew it and there was none such, the city was held to be equitably estopped.

In each of the following cases the estoppel was based on informal conduct of the City officials and the citizens knew of the informality.

People v. *City of Rock Island*, 215 Ill. 488, 74 N. E. 437

Baldwin v. *Trimble*, 85 Md. 396, 37 Atl. 176

Boise City v. *Wilkinson*, 16 Idaho 150, 102 Pac. 148

Rohrbaugh, Mayor v. *Mokler*, 26 Wyo. 514, 188 Pac. 448

Portland v. *Inman Poulsen Lumber Co.*, 66 Ore. 86, 133 Pac. 829

Paine Lumber Co. v. *City of Oshkosh*, 89 Wis. 449, 61 N. W. 1108

Reuter v. *Lawe*, 94 Wis. 300, 68 N. W. 955

People v. *Wieboldt*, 233 Ill. 572, 84 N. E. 646.

The majority opinion also gives considerable emphasis to the suggestion that the application of equitable estoppel deprives the citizens of Provo of the remedy of referendum. The Utah referendum statute in Section 25-10-21 U. C. A. 1943, (See Appendix A for text) provides that legal voters "may initiate any desired legislation and cause the same to be submitted to the law making body—." An ordinance to open a crossing would certainly seem to be well within the very comprehensive language used.

But in any event it must be clear that a municipality cannot avoid the estoppel resulting from the acts and conduct of its Commission by pointing to the referendum statute and contending that they are thereby deprived of their right to resort to the referendum statute. The reasoning of the majority opinion in this particular would eliminate the settled law of Utah, announced by the *Wall* and *Elkington* cases, that municipalities may be equitably estopped under certain circumstances.

The reasoning of the majority opinion would make it seem that the citizens of Provo were anxious to avoid the closing of Ninth South Street but are frustrated in that desire by the doctrine of equitable estoppel. This is based upon a petition in March 1943, signed by some 200 citizens protesting the closing of the crossing. This assumes that no more diligence is required by citizens to protect their rights than merely to file a petition with the City Commission even though thereafter they slumber soundly on their rights. There was a public announcement that the protest was disregarded by the City. The Mayor of Provo told the press on April 7, 1943, that the street would be closed and the enlargement of the yards would proceed. (Exhibit 26, R. 533, offered in evidence R. 90.) During the two or three months thereafter the streets actually

were closed and the yards constructed. If the citizens of Provo were so vitally interested in the matter, then was the time for them to move effectively by injunction, by "initiating" an ordinance to prevent the street closing under the referendum statute or other appropriate procedure. Instead, they were content to protest and remain silent when their protest was ignored.

The Supreme Court of Utah has held that this is not sufficient diligence. *Lewis* v. *Pingree Nat. Bank*, 47 Utah 35, 151 Pac. 558. The Bank entrance encroached on a public street so that it partially obscured the show windows on either side thereof. The owners on either side protested but did nothing more during the construction of the building. The court held that it was not enough to protest but that affirmative steps should have been taken to prevent the purpresture. The court on page 48 said:

> So here. If the plaintiff desired to prevent the erection of the bank front as planned, and as all others who were interested with him understood it was planned, and as he must have known it was planned and was being constructed, why did he not bring an action, as was done in the Tyson Case, which he now cites and relies on? Had he done that, the courts would undoubtedly have prevented the defendant from proceeding to erect the front as proposed by it. * * * Under those circumstances we think the plaintiff should be limited to his legal remedy, namely, the recovery of such an amount of damages as the usable value of his building may be depreciated by reason of the construction of the bank front as it now is.

Conclusion

The Majority Decision of the Circuit Court of Appeals, Tenth Circuit, has misconceived the Utah law as announced in *Wall* v. *Salt Lake City*, 50 Utah 593, 168 Pac. 766. The District Court, which would have been affirmed by Senior Circuit Judge Phillips, correctly held and adjudicated that under the facts in this case, Provo City should have been estopped and enjoined. The judgment and decree of the District

Court should have been affirmed. Failure so to do is inconsistent with the doctrine of:

Erie R. Co. v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817

Ruhlin v. *New York Life Ins. Co.*, 304 U. S. 202, 82 L. Ed. 1290, 58 S. Ct. 860

Prudence Realization Corporation v. *Geist*, 316 U. S. 89, 86 L. Ed. 1293, 62 S. Ct. 978

Corn Exchange Nat'l Bank & Trust Co. v. *Klauder*, 318 U. S. 434, 87 L. Ed. 884, 63 S. Ct. 679.

Respectfully submitted,

WALDEMAR Q. VAN COTT,

DENNIS McCARTHY,

Counsel for Petitioners.

APPENDIX A

Text of Various Utah Statutes

Compiled Laws of Utah 1876, Sec. 1174 reads as follows:

> That whenever the title to such lands shall be held by the corporate authorities of any town or city, all lands designated for public use by such corporate authorities as streets, lanes, avenues, alleys, parks, commons and public grounds, shall vest in and be held by the corporation absolutely, and shall not be claimed adversely by any person or persons whatsoever; and the judge of probate who shall have entered any lands in trust for any town or city which may afterwards become incorporated, shall, under the same conditions, convey by deed to the corporation thereof the lands designated for the use of the public as aforesaid; that in the case of death or disability of the judge of probate or mayor who may have entered the lands in trust for any town or city under the law of Congress, as aforesaid, before the complete execution of such trust, the same shall vest in his successor in office, who shall proceed with the execution of the same in the same manner, and under the same conditions imposed by this act upon the judge or mayor receiving the trust in the first instance.

Section 15-8-8 Utah Code Annotated 1943 reads as follows:

> They (the Board of Commissioners) may lay out, establish, open, alter, widen, narrow, extend, grade, pave or otherwise improve streets, alleys, avenues, boulevards, sidewalks, parks, airports and public grounds, and may vacate the same or parts thereof, by ordinance.

Section 340, Compiled Laws of Utah 1888, Vol. 1, reads as follows:

> To exclusively control, regulate, repair, amend and clear the streets, alleys, bridges, sidewalks or cross-

walks; and open, widen, straighten or vacate streets and alleys, and put drains or ditches and sewers therein; and prevent the encumbering of the streets in any manner, and protect the same from any encroachment and injury.

Section 373, Compiled Laws of Utah 1888, Vol. 1, reads as follows:

> The city council shall have exclusive authority and power to establish and regulate the police of the city; to impose fines, forfeitures and penalties for the breach of any ordinance; to provide for the recovery of such fines and forfeitures and the enforcement of such penalties, and to pass, make, ordain, establish and execute all such ordinances, not repugnant to the Constitution of the United States or the laws of this Territory, as they may deem necessary for carrying into effect and execution the powers specified in this act, and for the peace, good order, regulation, convenience and cleanliness of the city, for the protection of property therein from destruction by fire or otherwise, and for the health, safety and happiness of the inhabitants thereof.

Section 25-10-21 Utah Code Annotated 1943 reads as follows:

> Subject to the provisions of this chapter, legal voters of any city or town, in such numbers as herein required, may initiate any desired legislation and cause the same to be submitted to the law-making body, or to a vote of the people of such city or town for approval or rejection, or may require any law or ordinance passed by the law-making body of such city or town to be submitted to the voters thereof before such law or ordinance shall take effect.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 493

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, A CORPORATION; WILSON McCARTHY AND HENRY SWAN, TRUSTEES OF ITS PROPERTY,

Petitioners,

vs.

PROVO CITY, A MUNICIPAL CORPORATION; MAURICE HARDING, MAYOR, AND JOSEPH H. SWAPP AND BLAKE D. PALFREYMAN, COMMISSIONERS OF SAID PROVO CITY,

Respondents.

No. 494

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, A CORPORATION; WILSON McCARTHY AND HENRY SWAN, TRUSTEES OF ITS PROPERTY,

Petitioners,

vs.

PROVO CITY, A MUNICIPAL CORPORATION; MAURICE HARDING, MAYOR, AND JOSEPH H. SWAPP AND BLAKE D. PALFREYMAN, COMMISSIONERS OF SAID PROVO CITY,

Respondents.

REPLY BRIEF OF PETITIONERS ON PETITION FOR WRIT OF CERTIORARI

I and II

The authority and principle of Wall v. Salt Lake City was not changed by statute and was re-affirmed by the Supreme Court of Utah in Tooele City v. Elkington after the statutory enactment referred to.

Herein of Respondents' Points I and II.

Under Point I respondents argue as if Section 15-8-8

Revised Statutes of Utah 1933 and Utah Code Annotated 1943 had been amended in 1917 for the purpose of changing the rule in *Wall* v. *Salt Lake City*. As a matter of fact, the amendment in question was made in 1915, Laws of Utah 1915, Chapter 100, page 157. The *Wall* case had not yet been decided and was not decided until October 30, 1917.

Under Point II respondents contend that the rule in the *Wall* case was changed by the Supreme Court of Utah in *Tooele City* v. *Elkington*. On the contrary the principle of the *Wall* case was reaffirmed and applied by the court to the facts in the *Elkington* case and it was decided that the necessary elements of estoppel were not present. Indeed the Supreme Court itself, without suggestion or citation of the *Wall* case by counsel, raised the question as to whether Tooele was estopped under the doctrine of the *Wall* case. The question was whether a public street in a dedicated plat, which had never been used, could be deeded by Tooele City. It was held that it could not be. The history of Section 15-8-8 was described and attention was called to the fact that the statute was not complied with. The court, however, did not regard that as eliminating the doctrine of estoppel in pais but expressly recognized and applied the doctrine of the *Wall* case. If the court had regarded Section 15-8-8 as eliminating the doctrine of estoppel, that would have been the short answer in the case. Instead of that the court considered the equities of the case and concluded that there was no ground for the application of the estoppel and the principle of the *Wall* case. On page 494 the court said:

> In the case at bar, the consideration given the city by Elkington was small, if anything; the deed was made in contravention of the statute; there is no evidence that the property has been assessed against the defendants or their predecessor in interest; the time element is short; and there was not a replatting or a change in the whole neighborhood to the benefit of all adjacent landowners.
>
> Balancing the justices of the cause, we find there is no ground for an estoppel in pais as against the city.

The foregoing is according to the reasoning of Circuit Judge Phillips in his dissenting opinion, which is based upon unanswerable logic both as to the *Elkington* case and *Hall* v. *North Ogden City*. (R. 567.)

III

The elimination of the crossing made it unnecessary to secure from the Public Service Commission of Utah any order permitting the Railroad to cross Ninth South Street.

Herein of Respondents' Point III.

Respondents inaccurately state on page 8 that Sec. 76-4-15, U. C. A. 1943, gives the Public Service Commission exclusive power to abolish any crossing. A reading of the statute will disclose that it only gives the Public Service Commission exclusive power to determine and prescribe the manner, including the point of crossing and terms of installation, of a railroad over a public street. The statute is thus construed in *Union Pacific R. Co., et al.* v. *Public Service Commission*, 103 Utah 186, 134 Pac. (2d) 469, which holds that the power granted to cities by Section 15-8-8, U. C. A. 1943, prior to the Public Utilities law was not repealed by implication thereby. See page 195.

Analysis reveals that the decision of the question raised by respondents under Point III will follow the decision of whether the City was properly estopped to claim that the crossing was not vacated, abandoned or closed.

If the City had kept its promise to pass an ordinance eliminating the Ninth South crossing, the fee to that property, owned by the Trustees of The Denver and Rio Grande Western Railroad Company (R. 25, 26 = 158), would have been freed from the public easement. There would have been no public street to be crossed by the new railroad tracks and the Public Service Commission of Utah would have no jurisdiction whatever over the construction of said new tracks on property owned by the Trustees. If the City is estopped to claim that the crossing is not closed, vacated or abandoned, as required by law, as concluded by the court (R. 27), the case is precisely the same as that assumed above. Physically

there is no public street across that space. Exhibits 7, 8 and 10 (R. 511, 513, 517) are pictures of the space formerly occupied by Ninth South. Exhibit 12 (R. 521) shows the barricade on the west side of the tracks. Exhibit 9 (R. 515) shows the barricade on the easterly side of said tracks. *De facto* closing and vacation of Ninth South Street occurred in May, 1943, and has since existed.

Provo City now attempts to claim that the crossing was not vacated because no ordinance was passed. The District Court held that the City was estopped to make such a contention. If the District Court were correct, the situation so far as Provo City is concerned is precisely as if the ordinance had been passed as promised. This is exactly the effect given the estoppel in *Baldwin* v. *Trimble*, 85 Md. 396, 37 Atl. 176, and in *Grand Trunk Western R. Co.* v. *City of Flint*, 55 Fed. (2d) 384.

These perhaps are the reasons that induced the Public Service Commission to take the view expressed to Bradford and Jensen that they did not regard the controversy between the Railroad and the City as a matter in which the Public Service Commission had any interest and that it did not propose to pull chestnuts out of the fire for Provo City. (R. 108.)

IV

There is no substance to respondents' contentions with regard to the Utah referendum statute.

Herein of Respondents' Point IV.

It must be clear that a municipality cannot avoid the estoppel resulting from the acts and conduct of its Commission by pointing to the referendum statute and contending that they are thereby deprived of their right to resort to the referendum statute. The City's contention in this particular would eliminate the settled law of Utah, announced by the *Wall* and *Elkington* cases, that municipalities may be equitably estopped under certain circumstances.

Respondents' brief would make it appear that the citizens of Provo are anxious to avoid the closing of Ninth South Street but are frustrated in that desire by the doctrine of

equitable estoppel. This is based upon a petition in March, 1943, signed by some 200 citizens protesting the closing of the crossing. Respondents assume that no more diligence is required by citizens to protect their rights than merely to file a petition with the City Commission even though thereafter they slumber soundly on their rights. There was a public announcement that the protest was disregarded by the City. The Mayor of Provo told the press on April 7, 1943, that the street would be closed and the enlargement of the yards would proceed. (Exhibit 26, R. 533.) During the two or three months thereafter the streets actually were closed and the yards constructed. If the citizens of Provo were so vitally interested in the matter, then was the time for them to move effectively by injunction, by "initiating" an ordinance to prevent the street closing under the referendum statute or other appropriate procedure. Instead, they were content to protest and remain silent when their protest was ignored.

The Supreme Court of Utah has held that this is not sufficient diligence. *Lewis* v. *Pingree Nat. Bank*, 47 Utah 35, 151 Pac. 558. The Bank entrance encroached on a public street so that it partially obscured the show windows on either side thereof. The owners on either side protested but did nothing more during the construction of the building. The court held that it was not enough to protest but that affirmative steps should have been taken to prevent the purpresture. The court on page 48 said:

> So here. If the plaintiff desired to prevent the erection of the bank front as planned, and as all others who were interested with him understood it was planned, and as he must have known it was planned and was being constructed, why did he not bring an action, as was done in the Tyson Case, which he now cites and relies on? Had he done that, the courts would undoubtedly have prevented the defendant from proceeding to erect the front as proposed by it. * * * Under those circumstances we think the plaintiff should be limited to his legal remedy, namely, the recovery of such an amount of damages as the usable value of his building may be depreciated by reason of the construction of the bank front as it now is.

V

Respondents' statements as to the facts disregard the findings of fact which are supported by substantial evidence and are therefore binding upon the appellate court.

Herein of Respondents' Point V.

Rule 52 of Rules of Civil Procedure for the District Courts of the United States provides as follows:

> Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

The court in compliance with that Rule made separate findings of fact and conclusions of law. (R. 18-26.)

Respondents on pages 12-14, 16 and 17, contend that the Mayor and Commissioners did not promise that the ordinance closing the streets would be passed. They state that there is no such promise and that the record reflects nothing more than negotiations, discussions, correspondence and controversy with respect to the closing of Ninth South Street. This disregards the Court's finding that there was a promise by the Mayor and City Commissioners. (R. 20.) The fact thus found was accepted as binding upon the Circuit Court of Appeals by the majority opinion, which made the statement:

> "The Company, and the Mayor and Commissioners of the City, entered into negotiations resulting in an oral agreement that an ordinance would be passed closing Ninth South Street at the point where the existing tracks crossed it and that the facilities within the City would be enlarged." (R. 557.)

The minority opinion also so described the agreement. (R. 562, 563.) That finding is supported by the evidence of Bradford (R. 77, 78), Jensen (R. 141) and Lawrence (R. 168). The Mayor denied that the Commission promised the Railroad to pass an ordinance (R. 237) but merely said that the Commission would consider passing it. (R. 236.) Commissioner

Swapp both affirmed and denied that any commitment was made at the meeting. (R. 377.) Commissioner McGuire, when asked the direct question whether any commitment was made, answered, "I don't recall that there was any definite statement to that effect." (R. 409.) That the foregoing evidence supporting the finding is substantial and the finding not clearly erroneous will clearly appear from a reading of the above references to the record.

On pages 14, 15, and 17, respondents disregard the Court's findings in stating that the Railroad did not rely upon the agreement above described. The trial Court found the contrary. (R. 21.) The majority opinion of the Circuit Court of Appeals so stated this fact: "But relying upon the verbal agreement that it would be passed, the Company barricaded the street and constructed the enlarged facilities." (R. 557.) The minority opinion also so stated the fact. (R. 564.) The finding is supported by the uncontradicted evidence. The Railroad, relying on that promise, abandoned the alternative of building outside of Provo in the open country where there would be no problem of city streets crossing the yards. The Railroad, relying on the promise (R. 206) immediately after April 7, 1943 secured easement for (R. 96) and constructed (R. 96) the cut off road, 41.25 feet wide by 625 feet long (R. 97), from Fifth East to Ninth South. The cutoff road was constructed by the Railroad, accepted as a public road, was scraped and graded by Provo (R. 416) and has been constantly used as such. (R 261, 416.) It is shown on the Provo map as a public street. (R. 261.) The Railroad secured property rights necessary for the new yards and grading therefor was commenced north of the crossing on April 11, 1943 (R. 181) and continued until September, 1943. (R. 94, 95.) The Ninth South crossing was barricaded and closed to traffic in May, 1943. (R. 182.) Eght new tracks were laid across Ninth South in June and July, 1943 (R. 183) at a cost to the Railroad of $160,000. (R.21, 22 = 94-101.)

Respondents also disregard the findings of the trial court in stating on pages 15 and 19 that the evidence fails to show that the plaintiffs suffered or will suffer irreparable damage if the street is opened for use by the public. The majority

opinion of the Circuit Court of Appeals did not discuss this matter. The minority opinion showed in detail that irreparable injury would result to the Railroad. (R. 565.) The Court so found. (R. 23.) The evidence conclusively shows that the opening of Ninth South Street across the railroad yards and tracks would make it necessary for trains and cuts of cars being switched or stored to be divided at the crossing (R. 23 — 103); would make necessary much slower handling of trains and cars in the yards (R. 23 — 189); would reduce the usefulness and efficiency of said yards to the extent of approximately fifty percent (R. 23 — 104); would greatly increase the cost of operation of said railroad by said Trustees (R. 23 — 103); would constitute a serious danger and hazard to the public traveling across said railroad yards and tracks (R. 23 — 103-105, 187-190, 191-199); might make it impossible to handle the traffic (R. 24 — 104); would interfere with the efficient operation of the railroad and increase the costs of operation (R. 24 — 103-106); and might require abandonment of the new yards and relocation of the same outside Provo City at a cost of approximately $100,000.00. (R. 24 — 103-105, 187-190, 191-199.)

On page 17 respondents disregard the trial court's findings in contending that the City officials imposed five conditions to the closing of the Ninth South Street crossing. The trial court found that there were only two such conditions imposed (R. 20-21) and that the Railroad had not failed to fulfill them. (R. 24-25.) This finding is not discussed by the majority opinion of the Circuit Court of Appeals. The minority opinion stated the fact according to the trial court's finding. (R. 565.)

As to the first asserted condition, the court found that the Railroad never represented to nor promised Provo City that it would eliminate the protests or objections of any citizens or residents of Provo City and Utah County to the closing of said streets, but on the contrary affirmatively and consistently stated that it would not do so. (R. 24.) Mayor Harding testified both on direct (R. 234) and cross (R. 263) that Bradford stated at the February 25, 1943 meeting in the most specific and positive way that the Railroad could and would do nothing to eliminate the protests. Bradford also so testified (R. 131).

As to the second asserted condition, the court found and the evidence is, without any conflict, that the Railroad did not represent or promise Provo City that it would provide any crossing over, under or upon said railroad tracks but on the contrary has affirmatively and consistently informed Provo City, its Mayor and Commissioners that it would not do so. (R. 24 — 92, 141, 236, 396, 410.)

As to the third asserted condition, the court found that Provo City has never moved the water and light lines referred to; has never billed Trustees for the cost thereof; and Trustees have repeatedly stated their willingness to pay such costs and have requested bills therefor. (R. 24, 25.) This is supported by the uncontradicted evidence of Bradford (R. 107, Ex. 30 R. 111, Ex. 40 R. 122) and Mayor Harding (R. 314).

As to the fourth asserted condition, no contention is made by respondents that this condition was not met. The Court found that it was. (R. 21.) The uncontradicted evidence supports the finding.

As to the fifth asserted condition, the court found that the Public Service Commission of Utah informed the Railroad that it was not concerned with the closing of Ninth South Street and Fifth East Street or with the occupation by said railroad tracks of the space formerly occupied by said streets. (R. 24.) This was according to the uncontradicted evidence of Bradford (R. 108) and Jensen (R. 148). They quoted the Chairman of the Public Service Commission as so saying and of adding that they were not going to pull the chestnuts of the Provo City Commission out of the fire.

Respondents disregard the findings of the trial court on page 18 in stating that the City Officials did not acquiesce in the closing by the Railroad of Ninth South Street. The Court found that they did acquiesce. (R. 22, 23.) The majority opinion of the Circuit Court of Appeals did not discuss this matter. The minority opinion stated the facts of acquiescence in detail. (R. 564.) The evidence conclusively shows that the Mayor and Commissioners and City government as a whole acquiesced in the closing. Mayor Harding said that

he expected the Railroad to go ahead as it did, build the yards and barricade Ninth South, and that is why he didn't protest or prevent when he saw the Railroad so doing. (R. 258, 259.) J. P. McGuire, Commissioner of Streets (R. 412), knew when the streets were barricaded in May, 1943 (R. 413), wasn't surprised (R. 413), and made no objection or protest (R. 416, 417). When the Railroad provided the cut-off road he accepted it and scraped and graded it. (R. 416.) Commissioner Swapp knew that the streets were barricaded in May, 1943 (R. 383). The Mayor and Commissioners discussed the barricading of the streets (R. 383) and nothing was said to the effect that the Railroad was closing the streets without authority (R. 384). No one in the Provo City government made any protest or objection. (R. 171, 182.) The Mayor, Commissioners, City Attorney and City Engineer were in close touch with the construction of the new yards. They knew of the closing and barricading of Ninth South in May, 1943 (R. 251). They didn't communicate with the Railroad in any way about the closing and barricading. (R. 251.) The Commission made no charge that the closing and barricading was unauthorized during 1943 or 1944. (R. 252.) Ninth South and Fifth East have been barricaded and closed to travel ever since May, 1943. No effort has ever been made to open Fifth East Street (R. 168, 261). No effort was made by Provo City to open Ninth South until March, 1945. (R. 250, 251.) Prior to that time the City did not even ask the Railroad to open it. (R. 253.)

Respondents disregard the Court's finding in stating on page 18 that there was no acquiescence on the part of the public in the closing of Ninth South Street. The Court found that there was such acquiescence. (R. 22, 23.) The majority opinion of the Circuit Court of Appeals does not discuss these facts and evidence. The minority opinion states the fact in accordance with the trial court's finding. (R. 564.) The evidence clearly supports the trial court's finding. The fact of the closing of Ninth South and Fifth East Streets was conspicuously published in the Provo Press. (R. 22-23 = Exhibit 26, R. 90, 553) and was well known to citizens and residents of Provo City and Utah County. (R. 23 = 319, 342, 361, 366.) Approximately two hundred residents of Provo

City and Utah County prior to March 4, 1943, and thereafter protested in writing to the Mayor and Commissioners about the closing of Ninth South Street, but took no other or effective measures to prevent the same. (R. 23 — 346.) All other citizens and residents of Provo City and Utah County acquiesced in and made no objection to the closing of Ninth South Street. (R. 23.) No objection has ever been made to the closing of Fifth East Street where it formerly approached to and joined with Ninth South Street, by Provo City, its Mayor, any of its Commissioners, or any of the citizens or residents of Provo City or Utah County. (R. 23 — 168.)

The only authority cited by respondents on Point V is Elliott on Roads & Streets, 3rd ed., v. 2, sec. 1189. At pages 15 and 16 respondents set forth the entire section except the last paragraph, which reads as follows:

> It may be, however, that where there has been an abandonment or there have been misleading acts or other peculiar circumstances, as in some of the cases cited in the first two notes to this section, and improvements have been made and rights acquired on the faith thereof, such a case may be made as will justify the application of the doctrine of estoppel.

In the Fourth Edition of the same work the author states the doctrine much more strongly for the application of estoppel in the case at bar by adding to Sec. 1189 the following sentence:

> Such appears to be the general rule sustained by the weight of authority when the making of valuable improvements in a highway has been induced by the act of the municipality.

In footnote 9 on page 1696 Elliott cites cases supporting his statement from Illinois, Indiana, Iowa, Maryland, Michigan, Massachusetts, Montana, Nebraska, Ohio, Oregon, South Carolina, Wisconsin, Wyoming, New Jersey, Oklahoma, Texas and Utah. The Utah case is *Wall* v. *Salt Lake City*.

CONCLUSION

Respondents' brief is based wholly upon a complete misunderstanding of the cases of *Tooele City* v. *Elkington* and *Hall* v. *North Ogden City* and upon a complete disregard of the findings of the Court, all of which are based upon substantial evidence, not clearly erroneous and therefore not to be set aside or disregarded. The decision of the Circuit Court of Appeals should be reversed and the judgment and decree of the District Court should be affirmed.

Respectfully submitted,

WALDEMAR Q. VAN COTT,
DENNIS McCARTHY,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 493

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, A CORPORATION; WILSON McCARTHY AND HENRY SWAN, TRUSTEES OF ITS PROPERTY,
Petitioners,

vs.

PROVO CITY, A MUNICIPAL CORPORATION; MAURICE HARDING, MAYOR, AND JOSEPH H. SWAPP AND BLAKE D. PALFREYMAN, COMMISSIONERS OF SAID PROVO CITY,
Respondents.

No. 494

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, A CORPORATION; WILSON McCARTHY AND HENRY SWAN, TRUSTEES OF ITS PROPERTY,
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RESPONDENTS' BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

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Counsel for Respondents.

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RESPONDENTS' BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

Opinion of Court Below

The majority opinion of the Tenth Circuit Court of Appeals appears at pages 557-568 of the Record. Circuit Judge Bratton, in the majority opinion, so clearly, con-

cisely and intelligently disposes of the issues herein that we refer to it here as a preliminary statement of the case.

The Matter Involved

The Denver and Rio Grande Western Railroad Company closed a public street in Provo City, Utah, barricaded the same with fences, and placed across it several new tracks. All of this was done in plain contravention, of at least *three* Utah statutes, and of two decisions of the Supreme Court of Utah, namely:

> Tooele City v. Elkington, 100 Utah 485, 116 Pac. (2nd) 406, (1941)
>
> Hall v. North Ogden City, ... Utah ....., 166 Pac. (2nd) 221, (February 14, 1946)

These three statutes and the foregoing two cases, under the doctrine of Erie Railroad Co. v. Tompkins, 304, U. S. 64; Ruhlin v. New York Life Insurance Co., 304 U. S. 202; are controlling here.

I.

The complete and short answer to the petition in these cases is that the legislature of Utah changed the applicable statutory law *after* Wall vs. Salt Lake City, the case upon which petitioners rely, arose.

Petitioners rely *solely* upon the decision of the Supreme Court of Utah in Wall v. Salt Lake City, 50 Utah 593, 168 Pac. 766. The action of the municipal corporation which was complained of in that case occurred between the years 1891 and 1912. The acts which were held to vacate the street in that case were done during the years 1891 and 1912.

The evolution of the statute in question is outlined in the case of Tooele City v. Elkington, 100 Utah 485, 116 Pacific (2nd) 406 (1941).

We reprint here the evolution of the applicable statute as outlined by the Supreme Court of Utah in that case because the court lays special emphasis upon the changes made by the legislature *after* Wall vs. Salt Lake City. The italics are the court's.

"In the Compiled Laws of Utah, 1888, Sec. 1755, it is provided:

" 'The city council shall have the following powers:• • •

" '8. *To lay out,* establish, open, alter, widen, extend, grade, pave or otherwise improve streets, alleys, avenues, sidewalks, parks and public grounds *and vacate* the same.' "

"The same provision will be found in the Revised Statutes of Utah, 1898; except for the insertion of a semi-colon between the words 'grounds' and 'and', also in Laws of Utah, 1901, c. 124, 1903, c. 138, 1905, c. 42, Compiled Laws of Utah 1907, §206, subd. 8, and Laws of Utah, 1911, c. 120. There was added in 1915, Laws of Utah 1915, Chap. 100, the following to the above set forth provision: '206x8. *To lay out,* establish, open, alter, widen, extend, grade, pave, or otherwise improve streets, alleys, avenues, sidewalks, parks and public grounds; *and to vacate* the same; and to establish, maintain and to provide for the supervision of public playgrounds, recreation places and swimming pools.' "

"In Chap. 123, Laws of Utah 1917, Sec. 206x8, was amended to read as follows: '206x8. *To lay out,* establish, open, alter, widen, narrow, extend, grade, pave or otherwise improve streets, alleys, avenues, boulevards, sidewalks, parks and public grounds, *and to vacate* streets, alleys, avenues and boulevards or parts thereof, *by ordinance;* and to establish, maintain and provide for the supervision of bath houses, public playgrounds, recreation places and swimming pools.' (Italics added.)"

"The same provision is to be found in the Compiled Laws of Utah 1917, §570x8. In the Laws of Utah 1919, c. 11, this section was amended to read: '*To lay out,* establish, open, alter, widen, narrow, extend, grade, pave,

or otherwise improve streets, alleys, avenues, boulevards, sidewalks, parks and public grounds *and to vacate* streets, alleys, avenues, parks and boulevards or parts thereof, *by ordinance;* and to establish, maintain and provide for the supervision of bath houses, public playgrounds, recreation places, and swimming pools.' (Italics added.)"

"The Revised Statutes of Utah 1933, provide:

" '15-8-1. The boards of commissioners and city councils of cities shall have the power to control the finances and property of the corporation.
* * *

" '15-8-8. *They may lay out,* establish, open, alter, widen, narrow, extend, grade, pave or otherwise improve streets, alleys, avenues, boulevards, sidewalks, parks, airports and public grounds, *and may vacate* the same or parts thereof, *by ordinance.*' (Italics added.)"

"It will be noted that first the power was given to 'lay out * * * and vacate'; then the power was given to 'lay out * * * and to vacate * * *, by ordinance', and now there is the present power that the council 'may lay out * * * and * * * vacate * * * by ordinance.' "

At all times important to the decision of the Supreme Court of Utah in Wall v. Salt Lake City, above, upon which petitioner relies, the controlling statute gave to the city the power to "lay out * * * and vacate" streets. There was no requirement in the statute that the street be vacated *"by ordinance"*.

In 1917, however, the statute was amended and since that time the power conferred upon the city by the legislature is limited. It is the power only to vacate streets "by ordinance".

In the cases herein under consideration the applicable statute is Utah Code Annotated 1943, Section 15-8-8. The legislature therein defines the power of cities to vacate streets, as follows:

"They (cities and towns) *may lay out,* establish, open, alter, widen, narrow, extend, grade, pave or otherwise

improve *streets,* alleys, avenues, boulevards, sidewalks, parks, airports and public grounds, *and may vacate the same* or parts thereof, *by ordinance.*"

Not only has the applicable statute been amended since Wall vs. Salt Lake City, but moreover the Supreme Court of Utah has construed that statute in Tooele City v. Elkington, 100 Utah 485, 116 Pacific (2nd) 406 (1941). That decision is controlling here. The majority of the Tenth Circuit Court of Appeals so holds. In that case, the city of Tooele sued Elkington to quiet title in the city to an alley. Tooele City, a municipal corporation, by its Mayor conveyed the alley property to Elkington and the deed recited;

"This deed is executed under and by virtue of a resolution of the city council of Tooele City, Utah, duly adopted on the 7th day of March, A. D. 1938."

There was no dispute that the deed was executed pursuant to a *resolution* of the city council of Tooele City. No ordinance was enacted by the city council. The Utah statute provided then, as now, as follows:

"They (cities and towns) *may lay out,* establish, open, alter, widen, narrow, extend, grade, pave or otherwise improve *streets,* alleys, avenues, boulevards, sidewalks, parks, airports and public grounds, *and may vacate the same* or parts thereof, *by ordinance.*"

The Supreme Court of Utah held that there was no ground for any estoppel *in pais* against the city of Tooele. The Supreme Court said: "The community is interested in the vacating of streets and the legislature has provided that they be vacated by ordinance, in order that the community may have notice of the acts of the commissions and thereby protect the private property holder and the community against such actions."

The judgment of the lower court quieting title to the alley in the city was affirmed.

II.

The Supreme Court of Utah in Tooele City vs. Elkington, the case which *is* controlling here, pointed to the provision of the statute that streets may be vacated *by ordinance* and said in sweeping language that the powers of municipal corporations are delegated; that municipal corporations may exercise only the powers granted to them; and that such powers can be exercised only in the manner prescribed.

The language of the court follows:

"The powers of municipal corporations are delegated and a municipal corporation may exercise only the powers granted and in the manner prescribed. The question is whether the statute is directory or mandatory."

The Supreme Court of Utah held in Tooele City vs. Elkington, 100 Utah 485, 116 Pacific (2nd) 406 (1941), that a city cannot vacate a street *except by ordinance.* The Supreme Court held that the city was not estopped, *even though the city council had adopted a resolution and the Mayor, pursuant thereto had executed a deed* to the property in question to Elkington. The city authorities had gone much further in that case than the city authorities of Provo have in this. In the Elkington case the city council had formally adopted a resolution and pursuant thereto the Mayor had executed and delivered a *deed* to the property in question. Provo City in this case took no such action. At most the matter was in the negotiation or parley stage. Everyone concerned understood that an ordinance was necessary all through the negotiations and the railroad attorneys had submitted a proposed ordinance. No ordinance was ever enacted and no other formal action was ever taken by the Provo City Commission. The record in this case shows that all that took place was conversation between the railroad and the Provo City Officials. Those conversations disclose no definite verbal commitments, but, on the contrary, a wide difference of opinion as to the conditions which the city would require before an ordinance was enacted, and at most indefinite,

qualified and equivocal statements on the part of the Mayor.

The recent decision of the Supreme Court of Utah in Hall v. North Ogden City, ... Utah ....., 166 Pac. (2nd) 221, (Feb. 14, 1946), confirms the decision of the Utah Supreme Court in Tooele City v. Elkington, 100 Utah 485, 116 Pac. (2d) 406. Hall vs. North Ogden City was an action to enjoin the city from opening up as streets certain tracts of land indicated as streets by the official plat of the townsite. It was argued that the city had lost whatever title it may have had to the streets which were never opened as public thoroughfares or had ceased to be used as streets. But the contention was rejected, and in upholding the right of the city to open the tracts as streets, the court said: (page 225)

"The only way in which North Ogden could have lost title or be barred by estoppel and laches from asserting title, if at all, would be some acts which would either vest title in others or which would give others the right to preclude North Ogden from asserting its title. In view of the unequivocal language of the Townsite Act, title could not be acquired by individuals through adverse user. As stated in the case of Tooele City v. Elkington, 100 Utah 485, 116 P. 2nd 406, although a street or alley designated as such on the townsite plat has not been opened up, the officials of the municipality themselves could not convey the title without compliance with the statutes. the municipality or the public official holding title to It is necessary to find statutory authority for divesting the streets in trust for the town, of such title to the streets, in order for the appellants to prevail in this case. It is not claimed that any ordinance was adopted for vacating the streets in question, nor that the inhabitants of North Ogden ever filed any petition to vacate or alter any portion of the plat of North Ogden. The rule of estoppel, could not apply against the town as to lands charged with a public trust, for the reasons hereinbefore indicated. Any abandonment or vacation of the land for street purposes, to discharge it of the public trust, would have to be in the manner provided by statute."

In Hall v. North Ogden City there were seventy-five years of adverse user against the city and acquiescence by the city all that time in the extension of fence lines to the center of the street and the erection of valuable improvements in the area of the street.

The right of plaintiffs to prevent the city from opening up streets was necessarily involved in the action. It is incorrect to say, as petitioners do in their brief, that what the court said, quoted above, was purely *obiter dictum.*

We believe that no other authorities are necessary to sustain the position of the city of Provo in this matter. We think the law of Utah is clear as set forth in the foregoing statute and as interpreted by the Supreme Court of Utah in Tooele City v. Elkington, 100 Utah 485, 116 Pacific (2nd) 406 (1941); and Hall v. North Ogden City, ... Utah ....., 166 Pac. (2nd) 221. However, the decision of the Supreme Court of Utah is consistent with the authorities elsewhere.

The law of Utah under our statute and the decisions of the Supreme Court is that a city may not vacate a street except *by ordinance.* It is the law of Utah under the decisions of the Supreme Court in Tooele City v. Elkington and Hall v. North Ogden City that the city may not be estopped to claim that an ordinance is necessary.

III.

The Public Service Commission of the State of Utah has the exclusive power to determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use and protection of each crossing of a public road or highway by a railroad, and to alter or abolish any such crossing, to restrict the use of such crossings to certain types of traffic in the interest of public safety.

No track of any railroad shall be constructed across a public road, highway or street at grade without the permission of the Commission having first been secured. (Utah Code Annotated 1943, Section 76-4-15.)

The Denver and Rio Grande Western Railroad Company closed a public street in Provo, barricaded the same, and placed across it several new tracks. All of this was done without the permission of the Public Service Commission. (Exhibit E, R. p. 551). The effect of the judgment and decree of the District Court in this case is to sanction and perpetuate a violation of the Utah statutes. (Utah Code Annotated 1943, Section 76-4-15.)

The doctrine of equitable estoppel cannot be invoked to accomplish the purpose of vacating a public street in contravention of the statutes of Utah giving the Public Service Commission exclusive power to abolish any crossing, and requiring the permission of the commission first to be secured before any railroad shall construct a track across a public road, highway or street at grade. See the authorities supra, Points I and II of this brief.

IV.

The application of the doctrine of equitable estoppel in this case deprives the citizens of Provo of their legal right under Utah statutes to require the ordinance proposed to be passed closing Ninth South Street to be submitted to the voters of the city before it took effect.

Utah Code Annotated 1943, Section 25-10-21, says: "Subject to the provisions of this chapter, legal voters of any city or town, in such numbers as herein required, may initiate any desired legislation and cause the same to be submitted to the law-making body, or to a vote of the people of such city or town for approval or rejection, or may require any law or ordinance passed by the law-making body of such city or town to be submitted to the voters thereof before such law or ordinance shall take effect."

The Supreme Court of Utah in Tooele City v. Elkington, 100 Utah 485, 116 Pac. (2nd) 406 (1941), says: "The community is interested in the vacating of streets and the legislature has provided that they be vacated by ordinance, in order that the community may have notice of

the acts of the commissions and thereby protect the private property holder and the community against such actions."

Section 25-10-21 quoted above was enacted by the legislature to enable the citizens of a city to protect themselves against the action of the city commission. Such statute cannot be set aside by the city and railroad officials taking an unlawful method of vacating a street thereby binding the community in violation of statute and without opportunity to prevent such action.

An ordinance vacating a street is legislative in character and could under the foregoing statute be submitted to the electorate. Keigley v. Bench, 97 Utah 69, 89 Pac. (2nd) 480, 122 ALR 756.

If the city officials and the railroad were permitted to vacate a street in the manner claimed possible by petitioners, an easy evasion of the referendum statute is open to them. In this case the closing of Ninth South Street was unpopular. There were protests from the citizens.

(See exhibits 22, R. p. 532; 64, R. pp. 80 and 91; 53, R. p. 535; 54, R. p. 211; 56, R. p. 537; 57, R. p. 539; 58, R. p. 541; 59, R. p. 542; 60, R. p. 543; 61, R. p. 545; 67, R. p. 547; 68, 70 and 71, R. p. 548; 72, R. p. 549; exhibit G, R. pp. 249 and 368-373; and exhibit H, R. p. 552; R. pp. 427-467.)

If the commission had adopted an ordinance vacating the part of the street in question, the voters of the city would have had the right under this statute to cause the ordinance to be submitted to a vote of the people before it became effective and to defeat it if the requisite vote were cast against it. Cf. Keigley v. Bench, 97 Utah 69, 89 Pac. (2nd) 480. But under the procedure adopted by the city commission in this instance the people were deprived of that right, without any warrant in law. It is suggested that the matter might have been submitted to a referendum, even without passage of an ordinance. But a critical reading of the statute lends no support to that

contention. The statute is limited in scope and effect to the initiation of legislation and to the rejection of laws or ordinances passed by the law-making body. Here no law or ordinance was enacted. There was nothing to submit to the people for approval or rejection before it became effective, within the meaning of the statute. And certainly it was never contemplated that a city commission could by the procedure followed in this instance circumvent the statute and deprive the people of their right expressly granted by the statute to approve or reject the proposed abandonment of a portion of the street which was in active use as a public thoroughfare.

V.

Under the facts and circumstances of this case there is no equitable estoppel against Provo City, a municipal corporation, nor against the citizens and residents of Provo City. Material Findings are clearly erroneous within the meaning of Rule 52.

Should this honorable court conclude that the foregoing three Utah statutes and two Utah decisions are not sufficient reasons upon which to deny certiorari herein, we then respectfully suggest to your honors that, in any event, there is no basis in fact in this case upon which an equitable estoppel can be invoked.

We most certainly do *not* agree with petitioners that there is no dispute as to the facts involved. We most strongly contend that petitioners are in error when they assert (at page 3 of their petition) that,

"The findings of the trial court are supported by substantial evidence, are not clearly erroneous and are recognized by the majority and dissent as binding upon the Circuit Court of Appeals. Such Findings and evidence support the foregoing summary and short statement of the matter involved as will be demonstrated in the brief."

To be sure the majority opinion of the Tenth Circuit Court of Appeals disposes of the case by deciding the questions of *law* against the petitioners herein; and does

so even upon that view of the facts which is most favorable to petitioners. The decision, by the Tenth Circuit Court of Appeals, of the questions of law in favor of respondents made it unnecessary also to decide the issues of fact as to whether there is an estoppel in our favor. There is substantial dispute as to the facts as can be seen from the references to the record which follow.

If certiorari is granted the issues of fact as well as the issues of law will be opened up. It is submitted that the issues of fact should also have been resolved against petitioners and, therefore, this petition should be denied.

Petitioners misstate the findings and the evidence in their petition and brief. For example see page 2 of the petition, line 13. Respondents say: "The *city* . . . urged and induced the railroad . . . and promised the railroad that it would proceed forthwith to take the necessary steps to pass an ordinance. . . ."

"The *city* failed to keep its promise."

The "city" did not do anything of the kind. The record shows some *conversations* between the *Mayor* and some railroad officials from which it may be fair to assume that the *Mayor* made a promise of that nature. But nobody else did, and certainly the "city" did not.

The record shows the following:

The railroad's attorney and witness, Mr. Jensen (R. 141), testified that the "Mayor" stated that the street would be closed and the ordinance passed.

The railroad's station agent and witness, Mr. Lawrence (R. 168), testified that the "Mayor" said they would pass the ordinance.

The Mayor denied that he or the commissioners had, at the meeting of February 25th, promised that an ordinance would be passed closing the street (R. 236-237). He said that he and the commissioners told the railroad officials to submit an ordinance and that he and the commissioners would consider "whether or not we wanted to pass it . . . take the matter under advisement." (R. 237)

Commissioner Swapp testified that the promise was to consider the ordinance if the railroad attorney sent it down (R. 377, 386). Swapp testified that he had never at any time made a promise or statement that he would pass an ordinance. (R. 378) Swapp further testified that he had never told Mayor Harding to tell the station agent, Mr. Lawrence, that the railroad might go ahead, and that he had never authorized Mayor Harding to speak for him in anything like that. (R. 382) Swapp testified that the railroad was not authorized to go ahead with the construction. (R. 383).

Commissioner Swapp testified that he had opposed it all the way through. (R. 384) He testified that he told the Mayor and Commission that he could not understand why a company like a railroad would go ahead and build railroad yards and close a street without authority to do so. (R. 384)

He didn't think the street would be closed. (R. 385)

Commissioner McQuire testified (R. 409) as follows: The question of passing an ordinance was discussed at the meeting of February 25. Inasmuch as the railroad was familiar with the drawing of an ordinance of that sort, it was the understanding that they draw one and present it to the city attorney to look over and for the Commission to consider. McQuire did not recall any definite commitment or promise at that meeting.

McQuire testified as follows: (R. 409) "Well, it might be stated at this meeting, the matter of protest had come from employees of the round house; and if I am not mistaken, a cat-walk or some sort of means for the working men residing in the eastern part of the City to walk over to their work or to have an overpass was discussed, but the overpass was ruled out immediately. And some discussion was indulged in concerning a cat-walk that might be constructed if steel, material, could be procured, but the Railroad companies, as I recall it, didn't state definitely that they would construct it. The City Commission, however, at this time, I think, felt that that should be constructed by the Railroad Company."

"Q. Now, was any further discussion that you recall had at that time?

A. I don't recall now anything in addition to the discussion of the closing of the Ninth South Street and Mr. Jensen's preparing an ordinance to be looked over by the attorney and to be taken under consideration and advisement by the Commission.

Q. Has there ever been while you were a Commissioner any ordinance presented or any other motion, resolution, regarding the closing of Ninth South Street?

A. No, I haven't *see* an ordinance to that effect.

Q. Has the Commission as far as you know ever called the City Attorney to draw such an ordinance or to submit one?

A. No.

Q. Have you ever authorized Commissioner Swapp or Mayor Harding to commit you to speak for you in regard to these matters?

A. No.

Q. Have you at any time made any commitment or promise to Mr. Lawrence or any other railroad man that they might proceed with the construction of these tracks and that Ninth South Street would be closed?

A. No, I haven't discussed the matter with any of the railroad officials privately." (R. 410-411)

He testified that he recalled no commitment having been made at any meeting. (R. 412)

There is no evidence in the record of any positive promise, representation or action on the part of the Provo City Officials authorizing the plaintiffs to close Ninth South Street. The record reflects nothing more than negotiations, discussions, correspondence and controversy between plaintiffs and defendants with respect to the closing of Ninth South Street. The evidence does not show that the plaintiffs relied, in building their new yards and closing this public street, on anything more

than their interpretation of the understanding that they could do so drawn from the numerous negotiations had with the defendants about the matter. The record positively shows that the citizens of Provo registered their objections to the closing of Ninth South Street from a time prior to the alleged promises of the City Commission that the street would be closed, and have continued their objections verbally and in writing since that time. There is no evidence that there was bad faith on the part of either plaintiffs or defendants. And, finally, the evidence fails to show that the plaintiffs suffered or will suffer irreparable damage if the street is opened for use by the public.

The reason there is no estoppel in this case is well stated in Elliott on Roads & Streets, 3rd ed., v. 2, sec. 1189:

> "It has been held that non-user is evidence of abandonment, and many of the courts, influenced, perhaps, by the hardships that would result from a contrary holding in the particular cases under consideration, have applied the doctrine of equitable estoppel where the claimant had made expensive improvements and acquired, or apparently acquired, rights of such a nature and under such circumstances that to deprive him of them seemed highly inequitable and unjust. We doubt, however, if the doctrine of some, if not most, of these cases can be sustained upon principle, at least where the city or the local authorities have done no affirmative act to mislead the claimant. It is difficult to conceive upon what principle an equitable estoppel can be securely placed in such cases, for the person who encroaches upon a public way must know, as a matter of law, that the way belongs to the public, and that the local authorities can neither directly nor indirectly alien the way, and that they cannot divert it to a private use. As the person who uses the highway must possess this knowledge, and in legal contemplation does possess it, one of the chief elements of an estoppel is absent. An estoppel cannot exist where the knowledge of both parties is

> equal and nothing is done by the one to mislead the other. In addition to this consideration may be noted another influential one already suggested in a different connection, and that is, the private use of the public way was wrong in the beginning and wrong each day of its continuance, and it is a strange perversion of principle to declare that one who bases his claim on an original and continued wrong may successfully appeal to equity to sanction and establish such a claim. It is, at all events, a great stretch of the doctrine of estoppel and a wide departure from the rule laid down by the earlier decisions and confirmed by many of the modern authorities."

Respondent contends that the facts and circumstances created no equitable estoppel in that: (1) the railroad officials were advised by the city attorney and at all times both the city and railroad officials acted upon the assumption that it was necessary for an ordinance to be enacted vacating the street. The railroad claims that the city officials promised at the meeting of February 25, 1943, to enact an ordinance, but Mr. Bradford and Mr. Lawrence, railroad officials, went to the Provo newspaper and gave the story of the meeting immediately thereafter, in which those railroad officials said that a discussion had taken place and that the commission took the matter under advisement. (Exhibit 21, R. p. 531.)

The Mayor had many telephone conversations with Mr. Lawrence, but does not think he told him the ordinance would be passed in the conversation on April 9, 1943, but even if he did, the Mayor's statement could be construed as not more than a statement that the Mayor would vote for the ordinance when the matter came up, provided the railroad fulfilled the conditions laid down in the beginning.

Certainly, Commissioners Swapp and McQuire never promised anything.

The railroad officials came to the Mayor and city commissioners of Provo with a plan for the construction of new yards, represented the urgency due to the war

effort, and intensified traffic requiring additional freight yard facilities, appealed to their patriotism, requested that Ninth South Street be closed and represented that traffic conditions on University Avenue would be relieved. The city officials studied the problem, were favorably impressed, wanted the new yards in the city if possible, but stated the conditions of closing Ninth South Street to be: (a) The railroad had to eliminate the objections on the part of citizens and workers to the closing thereof; (b) the railroad had to provide access for workers going to and from work; (c) the railroad was to pay the cost of water and power line changeover; (d) the railroad to provide a cutoff to replace Fifth East Street at the point of intersection with Ninth South Street. (See exhibits 23, R. p. 82; 25, 37, R. p. 118); and, (e) the railroad was to get permission from the Public Utilities Commission to close the street. (See Exhibit 67, R. p. 547.)

The railroad has failed to eliminate the objections and to provide access for the workers to and from work.

There is no evidence of a representation or promise which binds Provo City or its citizens, but on the contrary, the record discloses negotiation, discussion, conversation, controversy, and parley which never reached fruition in an agreement or in compliance with the Utah legislative enactments.

(2) There was no reasonable reliance by the railroad. The railroad officials knew that an ordinance had to be passed by the commission before the street could be vacated. Most assuredly, Mr. Bradford's thirty-two years of railroad experience enabled him to deal at arm's length with the city officials concerning this matter. He knew an ordinance was necessary. (See Exhibit 24, R. p. 88.) He knew permission from the Public Service Commission was necessary. He knew that as the matter stood it rested in controversy and not in agreement.

At the meeting of September 28, 1943, heated words were exchanged between Mr. Bradford, the representative of the railroad, and Mayor Harding, each accusing the other of "not treating us fairly." (See Exhibit 67, R. p. 547.)

The plain fact of the matter is that the railroad decided to take a chance and make the improvement without an ordinance. In doing so, they acted at their peril.

The railroad actually commenced work on the new yard before the alleged promises were supposed to have been made. The Mayor's promise is alleged to have been made in a telephone conversation of April 9, 1943. Witness Zanolio testified that the work began March 6 or 7, 1943. (R. p. 180.)

(3) There was no acquiescence on the part of the city officials. The Mayor and Commissioners continued discussion and correspondence with the railroad officials concerning the settlement of the problems involved. The matter never got out of the negotiating stage. (See exhibits 21, R. p. 531; 26, R. p. 533; 30-42, R. pp. 111-124; 51, R. p. 480; 52, R. p. 481; 58, R. p. 541; and 61, R. p. 545; and exhibit B, R. p. 504; H, R. p. 552, inclusive.)

Some reliance in the record is placed by the railroad upon the fact that the city was changing water mains on Ninth South Street on or about the time of these negotiations. No acquiescence by the city in the closing of Ninth South Street can be assumed from this fact. The record is clear that the installation of these mains along Ninth South Street was a separate project. (Witness Jacob, R. p. 301.)

All during the time in question the city officials were insisting upon compliance with the conditions they required to the enactment of an ordinance.

(4) There was no acquiescence on the part of the public which should estop the citizens of Provo. Certainly the public did not stand by and permit the street to be closed without protest. The street was left open until about May 15, 1943, but the public began their protests by petition February 27, 1943, and petitioned again October 23, 1944; and those protests were continued in person and through the local newspaper and by further protest by petition down to and through the time of the trial of this matter. (See exhibits 22, R. p. 532; 64, R. pp. 80 and 91; 53, R. p. 535; 54, R. p. 211; 56; R. p. 537; 57, R. p. 539;

58, R. p. 541; 59, R. p. 542; 60, R. p. 543; 61, R. p. 545; 67, R. p. 547; 68, 70 and 71; R. p. 548; 72, R. p. 549; exhibit G, R. pp. 249 and 368-373; and exhibit H, R. p. 552; R. pp. 427-467.)

(5) The railroad claims it will be irreparably damaged if the street were re-opened.

There is no evidence that such would be the case. The railroad would still be able to use its yards. At most, if the street were re-opened and the crossing made available to the public, the railroad would be required to participate in the employment of watchmen on each side of the Ninth South Street railroad crossing, and to maintain warning devices. There is undisputed evidence that there are other public street grade crossings over more tracks than exist at the Ninth South Street crossing, and at points where the traffic is much greater than on Ninth South Street, where the railroad business is carried on without interference.

CONCLUSION

The Denver & Rio Grande Western Railroad Company closed a public street in Provo City, Utah, barricaded the same with fences and placed across it several new tracks. All of this was done in plain contravention of at least three Utah statutes.

Those three statutes are:

(1) Utah Code Annotated 1943, sec. 15-8-8, which requires a city street to be vacated "by ordinance." Tooele City v. Elkington, 100 Utah 485, 116 Pac. (2nd) 406 (1941).

No ordinance was enacted here.

(2) Utah Code Annotated 1943, sec. 76-4-15, which gives the Public Service Commission *exclusive* power over the manner and terms of installation, use and protection of grade crossings of highways by a railroad; and which forbids the construction of a track across a public street at grade "without the permission of the Commission having first been secured."

No such permission was obtained here.

(3) Utah Code Annotated 1943, sec. 25-10-21, which gives the voters of a city the right to require a referendum upon a proposed ordinance.

Keigley v. Bench, 97 Utah 69, 89 Pac. (2nd) 480, 122 ALR 756.

This statute was enacted by the legislature to enable the citizens of a city to protect themselves against the action of the city commission. The railroad and city officials, where they know strong opposition from citizens exists, cannot deprive the public of its veto upon their proposed action, by closing the grade crossing without an ordinance and preventing the referendum.

The claim of the railroad, and the judgment and decree of the Federal District Court below, was that Provo City officials and the citizens of Provo City were estopped to set up defenses under the foregoing statutes.

That judgment and decree is contrary to the decision law of the State of Utah. Tooele City v. Elkington, 100 Utah 485, 116 Pac. (2nd) 406 (1941); Hall vs. North Ogden City, ... Utah ....., 166 Pac. (2nd) 221.

The Utah Supreme Court follows what is the well recognized rule everywhere, namely, where the statutes prescribe the procedure to be followed in vacating a highway, street or alley, the statutory method is exclusive and must be substantially complied with. Elliott, Roads and Streets, 3rd ed., secs. 1184-1185; McQuillin, Municipal Corporations, 2nd ed. Revised, 1529.

It is difficult to conceive upon what principle an equitable estoppel can be said to apply in this case. The railroad officials knew as a matter of law that Ninth South Street in Provo City belonged to the public and that the city officials can neither directly or indirectly alien the right of way, and that they cannot divert it to a private use. The railroad officials knew that the Utah statutes prescribed the procedures to be followed in vacating a street and that the Supreme Court of Utah had held

a statutory method by ordinance exclusive. They knew that the statutes forbade the construction of a railroad track across a public street at grade without the permission of the commission "having first been secured." As the railroad officials must have possessed this knowledge, and in legal contemplation did possess it, one of the chief elements of an estoppel is absent. An estoppel cannot exist where the knowledge of both parties is equal. Moreover, the railroad's use of Ninth South Street was wrong in the beginning and wrong each day of its continuance, and it is a strange perversion of principle to declare that one who bases his claim on an original and continued wrong may successfully appeal to equity to sanction and establish such a claim. It is, at all events, a great stretch of the doctrine of estoppel and a wide departure from the rule laid down by the earlier decisions and confirmed by many of the modern authorities.

It is respectfully submitted that the petition should be denied.

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